

Commission Decision of 22 June 2005 on the aid measures implemented
by the Netherlands for AVR for dealing with hazardous waste
(notified under document number C(2005) 1789) (Only the Dutch
version is authentic) (Text with EEA relevance) (2006/237/EC)

COMMISSION DECISION

of 22 June 2005

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(Text with EEA relevance)

(2006/237/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1) (a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) By letter of 7 January 2003 (registered as received on 10 January under No A/30189), the Netherlands notified operating aid for AVR Nutsbedrijf Gevaarlijk Afval B.V. (hereinafter 'AVR Nuts') for treating hazardous waste in the Netherlands with a view to disposal. The bulk of the aid was for the incineration of such waste in two rotating drum furnaces ('RDFs'). The Netherlands invoked Article 86(2) of the Treaty and asked the Commission to decide that the measure does not constitute state aid within the meaning of Article 87(1) of the Treaty since it represents appropriate compensation for the obligation to provide a service of general economic interest ('SGEI') within the meaning of Article 86(2) of the Treaty. The case was registered under No N 43/2003.
- (2) The Commission requested additional information by letters of 7 February 2003 (D/50847) and 22 April 2003 (D/52566). The Netherlands submitted that information by letters of 24 March 2003 (registered as received on 28

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March 2003 under No A/32279) and 19 June 2003 (registered as received on 25 June under No A/34394). Representatives of the Netherlands and of the Commission met on 21 May 2003. Two competitors submitted a joint complaint on the aid by letter of 2 May 2003 (registered as received on 5 May under No A/33155). By letter of 20 May 2003 (registered as received the same day under No A/33548), they informed the Commission that a subsidiary of one of them supported the complaint as well.

- (3) By decision C(2003)1763 of 24 June 2003, the Commission initiated the Article 88(2) procedure in respect of the notified measure. The case was registered as aid measure No C 43/2003. This decision was sent to the Netherlands by letter of 26 June 2003 (D/230250). It was published in the *Official Journal of the European Union* dated 20 August 2003⁽²⁾. The Commission received comments from four interested parties (registered under Nos A/36309, A/36463, A/36645, A/36679, A/36870, A/37077, A/37480 and A/37569), including from the two competitors that had submitted the complaint in May, also on behalf of another company belonging to the group to which one of the two original competitors belongs (hereinafter these four entities together are referred to as ‘the two joint competitors’). The Commission forwarded these comments to the Netherlands by letters of 1 October 2003 (D/56129), 29 October 2003 (D/56898), 7 November 2003 (D/57120) and 12 November 2003 (D/57185). These letters also contained some further questions from the Commission.
- (4) By letter of 13 August 2003 (registered as received on 14 August 2003 under No A/35706), the two joint competitors informed the Commission that part of the aid had been paid to AVR Nuts and they asked the Commission to take an injunction decision to suspend further payments and a decision ordering the Netherlands to provisionally recover the aid pursuant to Article 11 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty⁽³⁾. As requested by the Commission on 20 August 2003 (D/55321), the Netherlands confirmed by letter of 25 September 2003 (registered as received on 30 September under No A/36690) that, as regards 2002 and the first quarter of 2003, the notified aid had been paid to AVR Nuts. By letter of 20 October 2003 (D/56735), the Commission informed the two joint competitors that it did not intend to take the decisions requested. The two joint competitors restated their request by letters of 14 November 2003 (registered as received on 17 November under No A/37909) and of 1 December 2003 (registered as received on 2 December under No A/38325). The letter of 1 December and the Commission’s reply of 24 November 2003 (D/57541) confirming its position actually crossed in the post.
- (5) After requesting an extension (letter of 14 July 2003, registered as received on 18 July under No A/35109 and letter of 29 October 2003, registered as received on 5 November under No A/37568) that was granted by letter of

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23 July 2003 (D/54737), the Netherlands commented on the Commission's decision by letter of 18 December 2003 (registered as received on 8 January 2004 under No A/30088). It gave its observations on the comments from interested parties by letters of 23 December 2003 (registered as received on 8 January 2004 under No A/30090), 23 January 2004 (registered as received on 29 January under No A/30621), 25 February 2004 (registered as received on 27 February under No A/31451) and 23 April 2004 (registered as received on 30 April under No A/33118). By means of the last two letters, the Netherlands also informed the Commission of ongoing developments at AVR Nuts. Since the mounting deficits would require increasing amounts of aid, it was decided to close one of the two RDFs with effect from 1 July 2004. Closure of the second RDF was still under consideration. It transpired that the original aid contract contained provisions to the effect that the Netherlands would grant some compensation for the costs of closure.

- (6) In view of the new information, the Commission adopted on 14 July 2004 decision C(2004) 2640 fin extending the Article 88(2) procedure to the compensation for the costs of the (possible) closure of the RDFs. On 16 July this decision was sent to the Netherlands, which asked for an extension of the deadline for comments and for a meeting to be convened to discuss the ongoing developments (letter of 30 July 2003, registered as received on 4 August under A/35996). A meeting between representatives of the Netherlands and of the Commission took place on 23 August 2004. Another meeting between representatives of the Commission and of the two joint competitors took place on 26 August 2004. For the rest, the law firm represented yet another competitor. The Netherlands commented on the Commission's decision by letter of 10 September 2004 (registered as received on 17 September under No A/36999). By letter of 30 September 2004 (D/56902), the Commission requested further information which the Netherlands provided by letter of 22 October 2004 (registered as received on 27 October under No A/38271). In that letter, the Netherlands confirmed that further aid had been paid to the recipient for the remainder of 2003, the first three quarters of 2004 and the closure of one of the installations.
- (7) The decision to extend the procedure was published in the Official Journal of 9 October 2004⁽⁴⁾. The Commission received comments from the two joint competitors (letters of 16 and 19 November 2004, registered under Nos A/38860 and A/38978). It forwarded these comments to the Netherlands by letter of 22 November 2004 (D/58307). The Netherlands made observations on these comments and answered the Commission's questions by letters of 22 December 2004 (registered as received on 5 January 2005 under No A/30171) and 12 January 2005 (registered as received on 17 January under No A/30525). In these letters, the Netherlands informed the Commission not only of the decision to close the remaining RDF but also of the corresponding compensation for the costs of closure.

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- (8) Lastly, the two joint competitors confirmed their opposition to the aid by letters of 25 April 2005 (registered as received the same day under No A/33476) and 2 May 2005 (registered as received on 12 May under No A/33884). Following these letters, yet another meeting between representatives of the Commission and of the two joint competitors took place on 26 May. Again, the law firm also represented the same third competitor (hereinafter this competitor together with the other two are referred to as the ‘three joint competitors’). At the meeting, a document was presented suggesting that further aid for 2004 had been paid to AVR Nuts.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1 Background and objective

- (9) Article 5(1) of Council Directive 75/442/EEC of 15 July 1975 on waste⁽⁵⁾ stipulates that ‘Member States shall take appropriate measures, in cooperation with other Member States where this is necessary or advisable, to establish an integrated and adequate network of disposal installations, taking account of the best available technology not involving excessive costs. The network must enable the Community as a whole to become self-sufficient in waste disposal and the Member States to move towards that aim individually, taking into account geographical circumstances or the need for specialized installations for certain types of waste.’ Article 5(2) of the Directive stipulates that ‘the network must also enable waste to be disposed of in one of the nearest appropriate installations, by means of the most appropriate methods and technologies in order to ensure a high level of protection for the environment and public health.’
- (10) In the early 1990s, with a view to meeting these objectives, a special landfill site (‘C2 depot’) and several RDFs began operations in the Netherlands. The C2 depot is used for the appropriate disposal of hazardous waste that cannot be incinerated (‘C2 waste’). The RDFs are used for the appropriate disposal of hazardous waste that, despite a low calorific value, can still be incinerated⁽⁶⁾ (‘RDF waste’). This incineration requires co-fuelling and, in practice, the most cost-efficient fuel is hazardous waste with a high calorific value.
- (11) In accordance with Article 8(3) of Directive 75/442/EC and Article 4(3) of Council Regulation (EEC) No 259/93 on the supervision and control of shipments of waste within, into and out of the European Community⁽⁷⁾, Member States may prohibit export of ‘waste for disposal’. It is only after various controls have been carried out that such waste may be traded. However, Member States are not generally allowed to prohibit the exportation to other Member States of ‘waste for recovery’⁽⁸⁾. The concepts of ‘waste for disposal’ and ‘waste for recovery’ have been clarified in various judgments by the Court of Justice of the European Communities⁽⁹⁾. As a result, compared with the interpretation given to date by the Netherlands, a smaller amount of hazardous waste qualifies as waste for disposal while a larger amount qualifies

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as waste for recovery. The distinction does not depend on the calorific value of the waste, but rather on the primary objective of the installation in which the waste is treated and on the nature of the waste.

- (12) C2 waste and RDF waste are supplied by companies in all sectors of the economy. Important sectors include metalworking, business and public services, the (petro-) chemical industry, transport and mining. Most of the waste is handled by specialised intermediaries that typically offer a service covering the various types of waste produced by a company, i.e. C2 and RDF waste, other hazardous waste and non-hazardous waste. Such services are, of course, largely tied to the place where the waste is produced, but the more specific types of waste are transported over longer distances. Several large industrial waste companies operate internationally, with establishments in various countries.
- (13) In recent years, the options for putting hazardous waste to effective use have increased. More and more of it is being used in the cement industry (in particular in Belgium) or for filling abandoned mines (in particular in Germany). The Court's strict interpretation of 'waste for disposal' has facilitated this development. At the same time, producers have further reduced the amounts of waste they generate. Within legal limits they can, at least to some extent, blend some of it with less hazardous waste, thereby reducing the costs of disposal or recovery. As a result, the supply of RDF waste fell from about 80 000/100 000 tonnes in 1995 to about 34 000 tonnes in 2002, compared with an anticipated figure of some 38 500 tonnes. In mid-2004 AVR estimated that only 16 000 tonnes of RDF waste would be offered to it annually⁽¹⁰⁾. The supply of C2 waste decreased from about 6 000 tonnes in 2000 to 4 000 tonnes in 2002. Exports of hazardous waste produced in the Netherlands have increased to some 36 000 tonnes, of which some 4 000 tonnes is RDF waste, resulting in overcapacity as regards disposal facilities. This has become a wider phenomenon affecting, for example, the United Kingdom, Germany and Belgium.

2.2 Recipient

- (14) The C2 depot and the various RDFs were originally set up by AVR Chemie C.V. ('AVR Chemie'), which is owned 30 % by the State and 70 % by Holding AVR Bedrijven N.V. ('AVR-Holding' or 'AVR' in short). AVR is a major player on the Dutch waste market. It is currently 100 %-owned by Rotterdam municipality, which has though recently announced its intention to sell its shares in AVR. As from the mid-1990s, AVR Chemie incurred losses (€10,9 million in 2000 and €7,2 million in 2001). For this reason, AVR wished to close down the three RDFs operating at that time. The Netherlands, however, reached an agreement on a restructuring. AVR Chemie was split up and AVR Nuts was created in order to continue with the disposal of C2 and RDF waste after the closure of one of the three RDFs. AVR-Industrial Waste Services Rotterdam B.V. ('AVR IW') was set up to take over the remaining activities

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on the (hazardous) waste markets, on which AVR wanted to remain active for its own commercial reasons. Both are wholly owned by AVR. AVR Chemie's only remaining activity is renting out the facilities to AVR Nuts. AVR Nuts and AVR IW cooperate closely. A service contract stipulates that most of AVR Nuts' management and commercial functions are carried out by AVR IW.

- (15) The capacity of the two RDFs for which AVR has a permit is 100 000 tonnes of hazardous waste per year. The theoretically available capacity is 80-85 % of the permitted capacity. AVR treated 84 880 tonnes of hazardous waste (both RDF and other) in 2001, 81 274 tonnes in 2002 and 78 297 tonnes in 2003. Incineration of RDF waste requires more or less the same quantity of other hazardous waste as fuel. The actual volume of RDF waste treated in the RDFs is estimated at 19 000 tonnes for 2002 and 23 000 tonnes for 2003. Certain types of RDF waste can also be disposed of in municipal waste incinerators, which operate at a lower temperature.
- (16) AVR Nuts is obliged to keep separate accounts in accordance with Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings⁽¹¹⁾.

2.3 The aid

2.3.1 The operating deficits

- (17) The aid and the activities for which it is granted are defined in a concession decision by the Minister for Housing, Spatial Planning and the Environment (VROM) dated 3 July 2002 and in a concession agreement between the Netherlands, AVR Holding, AVR Nuts, AVR IW and a number of other subsidiaries signed on 10 July 2002. By virtue of the decision, the State 'grants AVR Nuts the exclusive right for a period of 5 years to operate the C2 depot and deal with hazardous waste in the RDFs subject to the obligation to offer the services of these installations as services of general economic interest to the public on reasonable, transparent and non-discriminatory conditions and against socially acceptable tariffs, in compliance with the conditions and provisions laid down in greater detail in the concession agreement.' The agreement determines in detail the conditions for AVR Nuts' operations. It was to run from 1 January 2002 to 31 December 2006.
- (18) The aid amounts to 100 % of the predetermined operating deficit, which is calculated on the basis of a methodology laid down by an independent accountant. In the event of a predetermined operating surplus, 70 % of it would be used to pay back the aid granted previously. The predetermined deficits for 2002 and 2003 amounted to €1,5 million and €2,8 million respectively. Annex I to this decision provides a summary of the methodology and its application for 2002, 2003 and 2004. Most of the aid concerns the RDFs. For the C2 depot, the predetermined deficit amounted to €0.37 million in 2003, for example.

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- (19) In accordance with the service contract, AVR IW carries out most of AVR Nuts' administrative and operational functions. For this, it receives compensation the amount of which is included in the predetermined deficit on the basis of 'activity-based costing'. In practice, this meant that, for the years 2002-04, an average of 30 % of AVR's overheads was allocated to AVR Nuts.
- (20) One additional cost element which is included in the predetermined budget and for which AVR Nuts receives aid that it passes on to AVR IW concerns waste acquisition. Given the important weight of fixed costs, active acquisition of waste was considered necessary to maximise capacity utilisation and thus to minimise operating costs. The predetermined and actual costs are presented in Table 1 below.

TABLE 1

Predetermined and actual acquisition costs

	2002	2003	2004
Predetermined additional costs	514 000	532 000	550 000
Predetermined start-up costs - international acquisition	400 000	400 000	–
Total predetermined costs	914 000	932 000	550 000
Actual costs	875 000	900 000	930 000

- (21) At the outset, the deficit was expected to increase to €3,8 million in 2006, but market and operating conditions proved to be much more difficult than anticipated, with little hope for improvement. For the period 2002-03, in addition to the predetermined deficit, AVR Nuts incurred losses of €12 million. The predetermined deficits for 2004 and thereafter were expected to be much higher than foreseen and, indeed, the predetermined deficit for 2004 amounted to €8,898 million⁽¹²⁾. The calculation took account of the decision to close the RDFs.

2.3.2 Compensation for closure costs

- (22) In view of the mounting operating deficits, the Netherlands, as already indicated in points 5 and 7, reconsidered its policy. At the end of 2003, it was decided to close one of the two RDFs with effect from 1 July 2004. In the summer of 2004, it was decided to close the second one with effect from 1 January 2005. For the remaining years, the predetermined losses for accepting C2 waste were, as expected, small.

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- (23) The concession agreement provided that the State would compensate AVR financially for the remaining book value of investments carried out in favour of AVR-Nuts during the period covered by the agreement with the approval of the State but not yet written off. Applying this clause in advance, the Dutch authorities calculated compensation of €8 670 108 for the costs of closing down the first RDF. This amount concerns various investments which were written off to the extent of 50 % if they concerned both RDFs or to the extent of 100 % if they were made specifically for the RDF that was being closed down. The main items in this amount are €1,9 million for investments in fire safety, €3,3 million for a homogenisation plant, €1,5 million for replacing coke funnels and €0,5 million for a drum end and Stefferson ring. For the closure of the second RDF, the calculation includes €11 151 000 for the remaining book value of the installations and tangible fixed assets. This amount includes the other 50 % of the remaining book value of the above investments carried out with the approval of the State and 100 % of the remaining book value of the investments carried out with the approval of the State but concerning only the second RDF. This latter item includes notably the investment in the general overhaul of the remaining RDF, which was carried out during 2004. The overall cost was €3 273 000, which was more than expected. With the benefit of hindsight, this turned out to be an unfortunate investment.
- (24) Since the Netherlands was, in principle, also required by the concession agreement to compensate for the budget deficits up to and including 2006, the State had to negotiate with AVR on compensation for the additional costs of closing down the second RDF with effect from 1 January 2004, instead of the original date on which the agreement would have expired. The compensation thus includes the following additional amounts:
- €1,7 million to compensate for the negative impact in 2004 resulting from the fact that customers would need (gradually) to shift their waste streams to other facilities;
 - €5,843 million for recurrent fixed costs in the period 2005-06 ('doorlopende vaste kosten'), i.e. costs related, for example, to ICT infrastructure, office space rental, security contracts, and costs of common facilities such as a canteen. AVR had calculated a higher amount of €8,208 million;
 - €7,868 million for the additional redundancy costs attributable to the early closure of the remaining RDF. This amount is calculated as the difference between the estimated redundancy costs in the event of immediate closure and those in the event of closure at the end of the aid contract, i.e. two years later. The accepted amount is based on a detailed estimate that concerns some 244 workers and takes account of the fact that most of them can be redeployed internally;
 - other costs, such as the remaining book value of certain assets of other AVR companies acquired in order to provide the services stipulated in the service contract, the costs of site management and the cost of forgoing the

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contributions ('dekkingsbijdrage') that AVR IW would have received if the contract had been extended into 2005 and 2006, the non-budgeted costs of closure, and the costs of buying out multiannual contracts. AVR had put these costs at €29,567 million in total, which included, for example, an amount of €11,716 million for the additional losses incurred by AVR Nuts in 2002 and 2003. In their negotiations, the State and AVR agreed on an amount of only €1,238 million.

- (25) In those negotiations, the Netherlands was assisted by an independent accountant whose report was made available to the Commission. Altogether, the agreed compensation for closure of the second RDF amounted to €27,850 million. This is significantly lower than the sum of AVR's own estimates, viz. €58,544 million (or €46 828 million when the additional losses incurred by AVR Nuts in 2002 and 2003 are excluded). The Netherlands explained that, if the remaining RDF had continued operating until the end of 2006, the sum of the estimated operating deficits for 2005 and 2006 and the compensation for the costs of closure at the end of 2006 would have amounted to €31 million. The agreement on early closure therefore reduced the cost to the State.
- (26) This compensation for closure brings the total amount of aid for the period 2002-04 to €49 718 108 (see overview in Table 2).

TABLE 2

Overview of compensation paid to AVR

Predetermined budget deficit 2002	1 500 000
Predetermined budget deficit 2003	2 800 000
Predetermined budget deficit 2004	8 898 000
Compensation for remaining book value first RDF	8 670 108
Compensation for remaining book value second RDF	11 151 000
Compensation for additional closure costs	
– additional operating costs 2004	1 750 000
– recurrent fixed costs 2005-06	5 843 000
– additional redundancy costs	7 868 000
– other	1 238 000
	16 699 000

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Total aid	49 718 108
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(27) The Netherlands acknowledged that aid totalling €19 543 608 had been paid to AVR. The compensation for the closure of the second RDF has been paid into a blocked account.

2.3.3 The guarantee for removal and follow-up costs

(28) The concession agreement also contains a guarantee by the State that, if AVR Chemie is wound up, the State will pay a maximum of 30 % of the removal and follow-up costs of dismantling and decontaminating the installations. This percentage corresponds to the State's holding in AVR Chemie.

2.4 Operational aspects

(29) Prior to the concession agreement, the gate fees charged by AVR Chemie had been increased to a level of NLG 700/tonne (€317,6). Increasing fees even further would, according to the Netherlands, lead to practices such as mixing hazardous waste with other waste streams and illegal landfill, and this would not be conducive to reducing the operating deficit. The fees are high in comparison with those in neighbouring Member States, this being possible thanks to the Dutch policy of prohibiting exports of waste for disposal. The objective of the aid measures was to maintain the fees unchanged, not to reduce them. To this end, the concession agreement contains an annex laying down the structure and coverage of the fees and the method of calculating them. The Dutch authorities have control over the level of the fees as the predetermined budget deficit requires their approval beforehand and the fees are, of course, a crucial element in the calculation.

(30) Gate fees for high-calorific hazardous waste used as fuel are much lower than those for RDF waste. AVR Nuts 'buys' the former at market rates, i.e. fees that would be charged in the event of treatment, say, in foreign RDFs or in the cement industry.

(31) Fixed costs are very high compared with variable costs so, in order to minimise its losses, AVR Nuts seeks to maximise capacity utilisation. Therefore, the gate fees charged to suppliers of hazardous waste are reduced when the annual volume supplied increases. These 'staggered rebates' are fixed in advance and apply when RDF waste is offered together with at least 75 % of the same volume of high-calorific waste.

(32) All fees are fixed in advance for the entire concession period⁽¹³⁾ and apply equally to AVR's competitors and AVR IW. As from the start of the concession agreement, the fees for C2 and RDF waste were publicly available to any supplier. As from early 2004, this was also the case for high-calorific hazardous waste.

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(33) In order to be able to plan capacity utilisation, AVR IW asks suppliers each year to indicate how much waste they plan to supply and gate fees are calculated during the year on the basis of the corresponding staggered rebate. If the actual volume supplied at the end of year is higher or lower than indicated, a repayment is made or an additional charge calculated to take account of the appropriate staggered rebate based on actual supply. The agreements generally did not contain an obligation to supply the quantity indicated in advance.

3. REASONS FOR INITIATING THE ARTICLE 88(2) PROCEDURE

(34) In its decision to initiate the Article 88(2) procedure, the Commission expressed the following doubts.

(35) First, the Commission doubted whether AVR Nuts' activities could properly be regarded as an SGEI within the meaning of Article 86(2) of the Treaty as it was not clear, for example, whether AVR would be the only company capable of offering such services on the same or similar conditions. It also doubted whether the Netherlands had followed the appropriate procedure in selecting AVR Nuts. Furthermore, it doubted whether infringement of the 'polluter pays' principle was avoided under all circumstances as producers of the waste concerned must pay gate fees at a level that can be considered as a normal cost.

(36) Second, the Commission expressed doubts regarding possible overcompensation that could spill over into other segments of the waste market. It was concerned that overcompensation may also stem from the fact that the aid was based on an *ex ante* calculation, allowing AVR Nuts to keep part of any positive difference between actual and predetermined profits or losses.

(37) Third, if the measure were to be assessed under Article 87, the Commission doubted whether the Community guidelines on state aid for environmental protection⁽¹⁴⁾ (the 'guidelines on environmental aid') would provide justification for finding the aid compatible with the common market.

(38) In its decision to extend the Article 88(2) procedure, the Commission explained that it had similar doubts as regards the much higher amount of aid for 2004 and the compensation for the untimely closure of the RDFs.

4. COMMENTS FROM INTERESTED PARTIES

(39) Four interested parties sent in their comments following the Commission's decision to initiate the Article 88(2) procedure.

(40) The first of them argued that the measure would distort competition on the Irish market as it would enable AVR to charge prices below cost and significantly below normal market prices on the Irish market through its 50 %

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shareholding in a joint venture with the Irish company Safeway Warehousing/South Coast Transport.

- (41) The second interested party also pointed to the unfair competitive advantage enjoyed by the AVR/Safeway joint venture. Large quantities of hazardous waste are imported from Ireland. This interested party maintained too that the measure would distort competition on the international market for ‘turnkey clean-up’ operations of PCBs, pesticides and other hazardous organic waste.
- (42) The third interested party, Edelchemie, was concerned about the domestic market. It had developed its own technology for treating photographic and galvanic waste (ECO option) and recovering valuable materials from this waste (including precious metals and obsidian). The measures to assist AVR would not only harm its business but would also stifle technological development. Edelchemie's comments concern AVR Nuts, AVR Chemie and its predecessors as from 1963, providing details on Dutch hazardous waste policy over the years.
- (43) Lastly, the three joint competitors drew attention to the domestic market for RDF waste. Equivalent capacity to AVR's RDFs would exist both in the Netherlands and in other Member States. The expansion of AVR's activities would have created overcapacity on the Dutch market for RDF waste and the data on RDF waste would not give a complete and correct picture. In the mid-1990s AVR closed one of its RDFs and, even then, the supply of hazardous waste could be expected to decline further. In view of those expectations, it had been appropriate to close one of the two remaining RDFs. At the meeting on 26 May 2005, a representative stated literally that ‘The right decision [in 2002] had been to close down one RDF’. Moreover, AVR would abuse its dominant position by charging high fees, by requiring that the RDFs be supplied at the same time with high-calorific waste and because the fee structure would not be transparent and publicly available. It would, furthermore, enable AVR IW to charge fees for certain types of RDF waste and subsequently to treat this waste in the grate incinerators of the municipal waste incinerators, and this would result in lower operating costs as these furnaces can operate at a lower temperature.
- (44) The measure would constitute incompatible operating aid. The service would not constitute an SGEI and the four criteria resulting from the *Altmark* judgment and which determine whether or not compensation constitutes state aid⁽¹⁵⁾ would not be fulfilled. For the Commission to approve (part of) the aid, various conditions would have to be met to prevent cross-subsidisation, tying practices and price discrimination. In addition, the Netherlands should not be allowed to extend the measure by another ten years.
- (45) The two joint competitors also sent in comments following the Commission's decision to extend the procedure. They restated all the elements of their first

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submission and provided additional documents to demonstrate the existence of cross-subsidisation. In addition, the following issues were raised.

- (46) First, it was surprising that, despite the closure of one of the RDFs, the predetermined operating deficit was so much higher than initially foreseen. If the fourth *Altmark* criterion (efficiency) had been respected, the operating deficit should have fallen.
- (47) Second, they objected to the aid as compensation for closing down the RDFs. There was no countervailing obligation on AVR. This compensation should not be referred to as an indemnification and was not justified, among other things because the investments were made with a view to maintaining operations for 10 years, whereas they have been used for less than 3 years. They questioned as well the details of the calculations, in particular the amount to be written off, the redundancy costs and the recurrent fixed costs. The total amount was very high, much higher than the amount of €2 million referred to in Article 21(2) of the concession agreement. Furthermore, in a parliamentary document, it was stated that ‘when establishing the compensation to be paid to AVR for closure of the RDF, an agreement was reached on an outstanding claim of the Ministry for Housing, Spatial Planning and the Environment on AVR in connection with dioxine pollution of the Lickebaertpolder’. As a consequence, the Ministry received an amount of €2,5 million that was not expected for 2004. The three joint competitors were concerned that settling this dispute may have ‘polluted’ the calculation of the compensation. It gave them the feeling that ‘things are being covered up’.
- (48) Third, they objected to other advantages conferred on AVR by Article 21(5) of the concession agreement, in particular payment by the State of 30 % of the costs of removal and decontamination of the installations in the event of AVR-Chemie's being wound up. In the light of the state aid rules, the State should never have taken on such obligations.
- (49) Fourth, no SGEI would exist, especially since such a service was not necessary in the light of the various alternatives that existed such as pyrolysis, treatment in the cement industry, disposal in salt mines or treatment in energy plants and foreign RDFs. The activities concerned would be defined as an SGEI only when they proved to be loss-making. The concession agreement had been concluded merely with a view to financing the investments in the RDFs for which AVR Nuts had obtained an exclusive right. Furthermore, the two joint competitors doubted whether the aid guaranteed affordable prices for the service since AVR's gate fees were higher than those in neighbouring countries. The high fees would be explained by AVR's practices of tying and cross-subsidisation with respect to high-calorific waste used as fuel. They would not be transparent or publicly available. The profits would be booked with AVR IW, the losses with AVR Nuts. This enabled AVR IW to charge higher gate fees for RDF waste. Furthermore, AVR would refuse to accept RDF waste if not accompanied by high-calorific waste, thereby not complying

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with its obligations under the concession agreement by not providing the service to all customers. Finally, unlike with other alternatives, the quality of the service would be neither maintained nor improved.

- (50) Fifth, the aid would not respect the *Altmark* criteria. There had been no public tender procedure for granting the concession and the aid would not be established on the basis of the costs of an average, well-managed undertaking. Nor would it be established on the basis of criteria laid down in an objective and transparent way, it would be higher than necessary and it would spill over into other markets. RDFs abroad would be able to charge lower tariffs without state aid. Cheaper alternative disposal methods had not been taken into account either. Furthermore, AVR would be allowed to retain some of the profits if it operated more efficiently than expected.
- (51) Finally, the two joint competitors remarked that the Dutch authorities intended to continue to infringe the state aid rules since, in the case of a negative decision by the Commission, they would discuss it with AVR and look for a solution to the financial problems this might cause for AVR.

5. COMMENTS FROM THE NETHERLANDS

5.1 The applicable legislation

- (52) Since Community legislation allows Member States to prohibit the exportation of waste for disposal, the aid would not distort competition between Member States.

5.2 Service of general economic interest

- (53) The Netherlands argued that the aid is granted exclusively for an SGEI carried out by AVR Nuts. A public invitation to tender was not considered appropriate as AVR Nuts was the only company in the Netherlands able and willing to deal with *all* the C2 and RDF waste concerned. The concession, however, was published in the *Staatscourant*, following which any interested party had the possibility to lodge an appeal. No appeals were lodged. Furthermore, before the decision to close the RDFs, the Dutch authorities had already made the necessary arrangements for organising a public tender procedure for a prolongation.
- (54) The measure would comply with the *Altmark* criteria and should therefore not be regarded as state aid. Taking the predetermined deficits, for example, the State was assisted by an independent accountancy firm. The measure would not infringe the ‘polluter pays’ principle as the fees are higher than those in neighbouring Member States.
- (55) It would be absolutely wrong for AVR Nuts to accept only RDF waste when offered in combination with high-calorific waste. It also has been explicitly stated that the fees charged to other AVR companies for treating other waste should be the same as those charged to third parties⁽¹⁶⁾. The

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Netherlands asked an accountancy firm for advice on the possibilities of increasing transparency with regard to the agreements between AVR Nuts and AVR IW. The recommendations given were accepted and implemented.

- (56) As regards AVR Nuts' results, the Netherlands noted that the calculation of the operating deficit did not take into account any profit margin. In the unexpected event of a predetermined operating surplus, the profit would be limited to only 30 % of the surplus until such time as all previous aid had been repaid.

5.3 Comments on the comments from interested parties The Irish market

- (57) The Netherlands noted that the comments did not demonstrate how aid could affect the cost price of the joint venture between AVR and Safeways. That company would have to pay the same fees for treatment in Rotterdam as those charged to domestic suppliers of waste. Moreover, only one third of the waste collected by the joint venture would be treated in Rotterdam and only a small part of that would be C2 and RDF waste as defined in the concession agreement. Competitive prices might be explained by various other factors: 1. Safeway is the only company in Ireland operating transfer station where waste is efficiently sorted and separated before being sent to the most appropriate treatment facility; 2. there is a direct link with the transport company Southcoast, and this gives rise to logistic advantages and cost savings; and 3. in Ireland the level of fees used to be relatively high on account of the absence of competition.

The market for turnkey clean-up projects

- (58) For the treatment of waste resulting from turnkey clean-up projects, AVR would charge higher fees than it charges domestic suppliers. The average fee for all waste flows from other countries would be somewhat higher than the average fee charged domestically. Furthermore, lower fees would not result in higher aid as the aid depends on the predetermined operating deficit.

Domestic competition and alternatives to the RDFs

- (59) When the concession agreement was signed, both RDFs were operating at full capacity. Full capacity utilisation was expected in view of plentiful stocks. The current overcapacity was probably caused not by any increase in the market share of competitors but instead by increased reuse of the waste, e.g. after legally permitted dilution with other types of waste.

- (60) As regards pyrolysis, the Netherlands noted that AVR's fees were higher than those charged by the only company in the Netherlands with pyrolysis plants.

Payment of part of the notified measure

- (61) The Netherlands explained that part of the aid was paid because of the financial difficulties of AVR Nuts, in the light of the *Altmark* judgment and in view of the time necessary to conclude the formal investigation procedure under Article 88(2) of the Treaty.

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Edelchemie

- (62) The Netherlands noted that Edelchemie was working primarily in the field of photographic hazardous waste, which, for reasons of efficiency, cannot be dealt with by AVR. The company has various facilities of which the pyrolysis furnace would be most relevant for this case. However, the technology would not be suitable for all types of RDF waste, in contrast to AVR's installations. The environmental permit allows treatment in this furnace of not more than 10 000 tonnes, which would be completely insufficient for hazardous waste streams in the Netherlands. Since AVR would not deal with photographic waste and would charge market fees, the Netherlands do not see how the aid could damage Edelchemie's interests. Technological development is encouraged by, for example, specific incentive programmes and by requiring use of the best available techniques when environmental permits are granted. These permits are valid for five years. Any aid granted previously would fall outside the ten-year limit laid down in Article 15 of Regulation (EC) No 659/1999 and, as the installations are written off over ten years, calculation of AVR's expected operating deficits would not be affected in any event.

Alleged overcompensation

- (63) The Netherlands maintained that there has been no overcompensation, either in favour of AVR Nuts or in favour of AVR IW. The latter served as an intermediary but could not, and did not, exploit this position to obtain overcompensation. For example, the waste supplied by AVR Nuts' competitors, even when, on paper, it was received by AVR IW on behalf of AVR Nuts, was not taken into account in calculating the staggered rebates on the tariffs for the waste acquired by AVR IW itself. Such waste was delivered directly to the RDFs, not to AVR IW's site, as this would not be worth the additional logistical costs.
- (64) The aid to compensate for the costs of acquiring waste is appropriate. Active acquisition of RDF waste would be necessary as the possibility of diluting such waste or adjusting the packaging, after which the waste would no longer qualify as RDF waste, has been used increasingly. Without acquisition of such waste, AVR Nuts would see its market share reduced, losing it to alternative treatment options, particularly abroad. This would reduce capacity utilisation and increase losses. The compensation granted to AVR IW for the costs of acquiring high-calorific hazardous waste was explained by the need to have sufficient quantities of such waste available as fuel. The allocation of acquisition costs between AVR Nuts and AVR IW is based on this. With the closure of the RDFs, the seven jobs that correspond to the costs charged will be lost. This would prove that these seven jobs constitute additional acquisition costs incurred only in the interests of AVR Nuts.
- (65) The Dutch authorities submitted a study on the future development of alternatives for the disposal and recovery of the waste concerned in the

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Netherlands and in neighbouring countries (see point 13 above). The study shows that sufficient alternatives are planned in the future to guarantee safe and appropriate disposal and recovery of such waste.

- (66) The Netherlands also submitted an economic analysis of the concession agreement and potential overcompensation that had been carried out by a consultancy at AVR's request. The analysis noted firstly that AVR's main competitors all had the possibility of benefiting from higher staggered rebates but apparently preferred to supply part of the waste they acquired to alternative disposal or recovery facilities abroad. Secondly, the actual compensation to be granted by the Netherlands for the closure of the RDFs was significantly lower than AVR's own cost calculation of €45 million and the calculation of almost €40 million made by an independent accountant of these same costs. The main difference stemmed from the different cost calculations for redundancies.
- (67) The Netherlands provided the detailed calculation of the budget deficit for 2004. It was higher than in previous years despite the closure of one RDF since the market conditions had worsened and, in particular, the fees received for high-calorific hazardous waste had decreased.
- (68) The payment for dismantling and follow-up in the event of the liquidation of AVR Chemie will have to be discussed between the State and AVR as the State owns 30 % of AVR Chemie. The possibility of a negative decision by the Commission on the notified aid will, of course, also have to be discussed, and solutions will be sought, but not without taking into account the Commission's views.

6. ASSESSMENT

6.1 Existence of state aid

- (69) Article 87(1) of the Treaty provides that 'any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'.
- (70) The operating aid and the compensation for the costs of closing down the RDFs for AVR Nuts that are described in points 17-27 are granted by the State and financed directly from state resources. They are selective in nature as they affect in the first place AVR, AVR Nuts and AVR IW. These are undertakings offering their services on the markets in waste for disposal and waste for recovery. The same applies to any payment by the State of the removal and follow-up costs, for which the State has given a guarantee of up to 30 %.
- (71) The measures must be regarded as affecting trade between Member States. The markets in waste for disposal and waste for recovery are inextricably linked and, despite the regulatory framework for and strict controls on waste for disposal, trade between Member States is common on both markets. By

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way of illustration, following the announcement of the closure of the RDFs, the number of applications for permits to export waste to other Member States increased significantly. The Commission deduces from this that the aid towards the continued operation of the RDFs has had a restrictive effect on trade between Member States.

- (72) The measures do not favour the suppliers of hazardous waste. The gate fees for high-calorific waste used as fuel were set at market levels compared with the fees practiced in the Netherlands and neighbouring countries. The gate fees for C2 and RDF waste were set, for policy reasons, at socially acceptable levels that were, however, higher than those practiced in neighbouring countries. This was possible given the export restrictions on waste for disposal. Raising the fees was not a feasible and realistic option under normal market conditions since more waste would be exported, mixed into other waste streams or disposed of legally or illegally, and this would not therefore increase AVR Nuts' revenues. As a matter of fact, with the closure of the RDFs, it became easier for suppliers to benefit from the lower gate fees in Belgium and Germany. Without the aid, the RDFs would have been closed earlier and the possibilities of exporting waste for disposal in conformity with Regulation (EC) No 259/93 would have improved earlier. This is confirmed by the price and volume movements following the closure of the second RDF. For these reasons, the Commission considers that the measure has not spared the suppliers of hazardous waste the costs that would normally be included in their budget.
- (73) Without prejudice to the assessment of the measure on the basis of Article 86(2) of the Treaty, the Commission finds that the fourth criterion resulting from the *Altmark* judgment is not met. Firstly, AVR Nuts was not selected following a public tender procedure, and publication of the concession decision in the *Staatscourant*, after which interested parties could raise objections for a period of six weeks, cannot be the substitute for an open and transparent tender procedure. Secondly, the level of compensation was not determined on the basis of the costs which an average, well-managed undertaking adequately provided with waste treatment capacity would have incurred. As a matter of fact, given the unique position of the C2 depot and the RDFs in the country, such an average undertaking does not seem to exist in the Netherlands. The predetermined budget deficit reflects, if anything, the particular conditions under which AVR Nuts operates these installations and the costs of similar installations abroad have not been taken into account. It is clear that AVR's treatment capacity was not appropriate: overcapacity led to underutilisation of the RDFs and ultimately to closure. This is reflected in the aid measures, in particular the deficit for 2004 and the compensation for closure. Under the circumstances, the measures must be regarded as conferring a selective advantage on AVR Nuts and not simply as providing compensation that other companies in a similar situation could have received

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under similar conditions if they had been entrusted with the performance of this service obligation.

- (74) A selective benefit flows not only from the operating deficits and the compensation for the costs of closure, but also from the state guarantee for 30 % of the removal and follow-up costs incurred. The fact that these costs correspond to the State's shareholding in AVR Chemie do not alter the state aid character of the measure since, as a silent partner in AVR Chemie, the State would be responsible only to the extent of its shareholding, and not for additional claims that may exceed that amount. The guarantee seems rather to result from the State's policy objective of avoiding a situation in which, after the liquidation of AVR Nuts and AVR Chemie, no other company could be held liable for the appropriate removal and follow-up. The guarantee may have conferred benefits for the entire duration of the concession agreement since, without the guarantee, a company would (have to) build up the necessary reserves during the operational lifetime of the installations in order to be able to cope with the removal and follow-up costs without aid.
- (75) Consequently, the notified measures constitute state aid within the meaning of Article 87(1) of the Treaty.
- (76) The Commission regrets that the Netherlands has implemented a significant part of the aid in question in breach of Article 88(3) of the Treaty.

6.2 Assessment on the basis of Article 86(2) of the Treaty Classification as an SGEI

- (77) Member States are free to define what they regard as services of general economic interest on the basis of the specific features of the activities. This definition can only be subject to control for manifest error⁽¹⁷⁾. In its 2003 Green Paper and its 2004 White Paper on services of general interest⁽¹⁸⁾, the Commission outlines the guiding principles of its approach. Section 3.4 of the White Paper stipulates that 'in line with the Union's policy on sustainable development, due consideration has to be taken also of the role of services of general interest for the protection of the environment and of the specific characteristics of services of general interest directly related to the environmental field, such as the water and waste sectors.' This is in line with the case law of the Court, which ruled that 'the management of a particular waste may properly be considered to be capable of forming the subject of a service of general economic interest, particularly where the service is designed to deal with an environmental problem'⁽¹⁹⁾.
- (78) For the following reasons, the Commission agrees with the Netherlands that the service as defined in the concession decision and the concession agreement constitutes an SGEI.
- (79) First, there is an obvious public interest in appropriate treatment when hazardous waste is disposed of. There is as well a public and Community

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interest in ensuring the availability of sufficient domestic capacity for such disposal. In accordance with the objective laid down in Article 5(1) of Directive 75/442/EC, Member States should strive to become self-sufficient in the disposal of waste.

- (80) Second, public intervention was necessary to safeguard this public interest. Since the RDFs were operated at a loss, without the aid AVR would have closed the RDFs and the C2 depot at the end of 2001.
- (81) Third, the public interest was real. Between 2002 and 2004 significant quantities of RDF and C2 waste produced in the Netherlands were disposed of, although they were significantly below expectations on account, among other things, of the consequences of the ruling by the Court which clarified the definitions of ‘waste for disposal’ and ‘waste for recovery’. The Netherlands responded to market developments by adapting the capacity to the new perceived needs and ultimately by abandoning its policy and closing down the only remaining RDF. This, however, is not incompatible with the public interest as regards the actual quantities of RDF and C2 waste disposed of. The quantities of waste for disposal might have been smaller if the Netherlands had applied the correct definitions from the outset, but it is unlikely that all RDF and C2 waste would have been used for recovery purposes. This is confirmed by the quantities of RDF and C2 waste offered to AVR Nuts in 2004 and by the quantities of RDF waste exported for disposal in RDFs abroad. The interested parties may have been right in maintaining that all hazardous waste produced in the Netherlands during that period could have been disposed of or recovered within the country or abroad even without AVR’s RDFs. They failed, however, to demonstrate that without AVR’s RDFs no exports of waste for disposal abroad would have been necessary at all because of the absence of sufficient capacity. It is precisely in this connection that the Netherlands could legitimately base its policy on the desire to defend the public interest, in line with the objective of Article 5(1) of Directive 75/442/EC.
- (82) Fourth, the measures do not infringe the ‘polluter pays’ principle. As concluded in point 72, the suppliers of waste are not spared the costs that should normally be included in their budget.
- (83) Fifth, classification as an SGEI does not circumvent the rules that normally apply. The measure seeks to protect the environment since it ensured appropriate treatment of hazardous waste at a location near its source. The environmental aid guidelines contain rules on operating aid to promote waste management (Section E.3.1). These rules, however, were drawn up in the first place in respect of operating aid granted to companies that produce the waste concerned themselves.
- (84) Sixth, by nature, the bulk of the RDF and C2 waste is supplied by companies, but collection systems exist for the safe and easy disposal of any hazardous waste from households. Some of the hazardous waste collected can then be

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disposed of in the RDFs. So the service for which the aid was granted was general in character and did not favour a limited number of users.

- (85) The two joint competitors claim that there is no market failure to justify the SGEI. Moreover, in some Member States there were no RDFs at all. The objectives of Directive 75/442/EEC, i.e. self-sufficiency in waste disposal and waste disposal close to the source of the waste (proximity principle), may not correspond to a market outcome but are no less legitimate for that reason.

Precise definition and entrustment of the SGEI

- (86) A public service mission needs to be clearly defined and must be explicitly entrusted through an act of public authority. In this case, the proper entrustment of the SGEI is clear from the concession decision and the concession agreement. The definition of the public service obligation in these documents is sufficiently precise. It is strictly linked to the waste for the C2 depot and to the low-calorific waste to be incinerated in the RDFs. The aid measures to compensate for the costs of the SGEI are also described in sufficient detail. However, the following must be noted.

- (87) First, there have been shortcomings as regards transparency. It may not always have been clear to competitors whether AVR IW acted on its own behalf or on behalf of AVR Nuts. In addition, the system of fees and rebates, in particular as regards high-calorific waste to fuel the RDFs, has not been sufficiently transparent from the outset. For AVR and the State, and for independent controllers, however, these issues were sufficiently clear from the concession agreement, and this made appropriate control possible.

- (88) The Commission considers that the method described in Annex I is sufficiently transparent for control purposes, and deems sufficient the additional measures to increase transparency in the execution of the SGEI that were adopted pursuant to the comments received.

- (89) Second, the concept of ‘socially acceptable fees’ for the disposal of RDF waste is rather vague at first sight. In practice, however, this has not caused a problem. The fees remained at the level to which they had been raised in the preceding years. In accordance with the ‘polluter pays’ principle, they were higher than the fees for disposal abroad. At the same time, neither the interested parties nor the Netherlands have argued that lower fees were necessary to avoid illegal practices that could be harmful to the environment. Apparently, the Netherlands regarded the fees as not being *too* high, given the agreement on the predetermined budget deficits, which were based on more precise assumptions regarding the fees to be applied.

Absence of overcompensation

- (90) Overcompensation must be avoided for all aid elements in the system. In this respect, the Commission assesses the following elements separately: 1. the compensation for the budget deficits in 2002 and 2003; 2. the compensation for the budget deficits in 2004, 2005 and 2006; 3. the compensation for the

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costs of closure, which consists in (a) compensation for closure costs related to the agreed investments to the extent that they have not yet been written off, and (b) closure costs resulting from early closure of the RDFs; and 4. the aid contained in the guarantee.

- (91) As regards the 2002 and 2003 budget deficits, the Commission considers the methodology for calculating the expected deficits, which are to be granted as aid, to be appropriate and sufficiently restrictive. All the elements, apart from the compensation for acquisition costs (see points 108-113), are directly related to the fulfilment of the public service obligation. There is no reason to believe that cost elements have been artificially inflated and that the assistance of an independent consultant has helped the Netherlands to calculate the aid in a restrictive way. The methodology contains a more detailed analysis of AVR Nuts' opening balance sheet, which provides a sound basis for the estimates of AVR Nuts' costs and revenues in the new situation. Variable costs, direct fixed costs and costs charged by other AVR companies are estimated on the basis of detailed breakdowns. Investments and depreciation are duly taken into account by means of a detailed investment plan for 2002-16 and by writing off new investments over 7,24 years. This ensured that costs were not artificially inflated by individual investments or disproportionate depreciation. The comments from interested parties raised various issues, but no proof of overcompensation was provided. For 2002 and 2003, moreover, accidents and technical difficulties caused losses that exceeded the predetermined deficits by a total of €12 million. Any overcompensation in favour of AVR Nuts during that period is, therefore, ruled out.
- (92) For the years 2004-06, the aid is based on the same methodology and so the Commission does not *a priori* expect any overcompensation. The predetermined budget deficit in 2004 is based entirely on the same methodology and the increase in the predetermined deficit, despite the closure of one of the RDFs, is fully explained by the various cost elements of this methodology (see the figures in Annex I). Given the high losses in excess of the predetermined deficits for 2002 and 2003, it need not surprise anyone that the predetermined deficit for 2004 was higher. The closure of the first RDF, moreover, may have reduced the variable costs, but its impact on fixed costs, which account for a significant part of total costs, has been limited. Nevertheless, in line with the Commission's general policy, overcompensation for the cost of an SGEI should be excluded not only *ex ante*, but also *ex post*. The Commission, therefore, requests the Netherlands to verify the actual costs and to adjust the aid level if necessary in order to avoid a situation in which compensation would allow AVR Nuts to earn a profit margin on its activities higher than is normal for this type of activity in this sector.
- (93) The Commission accepts that aid can be granted as compensation for closure costs related to the agreed investments to the extent they have not yet been written off. Without sufficient guarantees, one cannot expect an operator to

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enter into a five-year service contract that requires substantial investments. Depreciation of the investments over the period corresponding to the duration of the agreement, i.e. five years, would have been just as unreasonable. It would have increased significantly the predetermined losses over that period and hence the level of aid. The relevant provisions in the concession agreement constitute a necessary and efficient corollary to the compensation system. The fact that those provisions were applied before the planned expiry of the concession agreement does not alter this assessment. On the basis of the information provided by the Netherlands, the Commission does not expect there to be any overcompensation for this element. A few aspects, however, are not sufficiently clear, viz. whether any proceeds from the sale of assets or any profits from continued use for other purposes will be properly taken into account. Consequently, for this element too, the Commission requests the Netherlands to verify the actual costs and to adjust the aid level if necessary.

- (94) The Commission can also accept that compensation is granted for additional costs resulting from the earlier-than-expected closure of the RDFs. A Member State cannot be obliged to continue with such a contract, especially if it thereby pays less than what it probably would have had to pay if the activities had been continued. The information provided by the Netherlands on these additional costs is relatively detailed. Various elements, however, are based on estimates which seem to present a rather wide margin of uncertainty. Moreover, only the costs necessarily linked to the SGEI and to the earlier-than-expected closure can be included, and it is not sufficiently clear from the information available whether this is indeed the case. Consequently, for this element as well, the Commission requests the Netherlands to verify the actual costs and to adjust the aid level if necessary.
- (95) Lastly, the Commission can accept that aid is granted through application of the guarantee covering 30 % of the costs of removal and decontamination. Had there not been a guarantee, the operating deficits and the operating aid would probably have been higher on account of the corresponding provisions that would have had to be made. The costs as such are directly linked to the original policy objective of offering the SGEI concerned in the Netherlands. The actual costs, however, are not yet known, so the Commission will require appropriate *ex post* control.
- (96) To sum up, the Commission finds no overcompensation for the operating deficits for 2002 and 2003 but can allow the remaining aid elements only on condition that the Netherlands ensures that there is no overcompensation *ex post* over the entire period, taking into account excess losses and profits for all the years covered by the concession agreement. The aid may allow AVR Nuts to earn a reasonable profit margin on the activities concerned. The risk for AVR under the agreement was limited since predetermined losses would be fully covered by the aid, but AVR remained largely exposed to the operating risk⁽²⁰⁾, with the result that risk was not excluded, as indeed proved to be the

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case in practice. Given the market conditions and AVR Nuts' risk profile, the Commission can certainly accept a profit level equivalent to the rate of return on Dutch government bonds plus 2 percentage points. If, in practice, profit is found to exceed this threshold, the Netherlands must retroactively adjust the aid level and, in accordance with Article 88(3) of the Treaty, notify any aid that allows AVR Nuts to exceed the threshold. The *ex post* verification must adequately verify the absence of overcompensation. To this end, the Commission requires detailed monitoring reports which must address at least the issues specified in Annex II.

Proportionality and no distortion of trade contrary to the common interest

- (97) The Commission exercises control of proportionality so as to ensure that the means used to perform the general interest task do not lead to unnecessary distortions of trade. Specifically, it has to be ensured that any restrictions on the rules of the EC Treaty, especially restrictions on competition and limitations on the freedoms of the internal market, do not exceed what is necessary to guarantee effective fulfilment of the task.
- (98) The Commission considers that the measures adopted by the Netherlands comply for the most part with the proportionality requirement. It is difficult to imagine by which other means the Netherlands could have ensured the availability of sufficient domestic capacity for disposing of hazardous waste. None of the interested parties has argued that there were less distortive alternatives available to meet this objective. The following aspects of the measure are considered to be proportionate as well.
- (99) Gate-fee system based on staggered rebates: Since the aim of this system is to maintain sufficient capacity for the proper disposal of RDF waste, the natural consequence is to aim for maximum capacity utilisation in order to minimise costs. As shown by the Netherlands, all suppliers could have applied for a refund, either directly or when supplying via intermediaries. The gate-fee system based on staggered rebates is justified. The system of non-discriminatory fees and staggered rebates for all suppliers, including AVR IW, has limited the distortion of competition resulting from the measure. Although there may have been some confusion in practice, the non-discriminatory nature of the system could have been clear to any interested party. The Netherlands has taken sufficient additional measures to increase transparency when there appeared to be some confusion. Setting the fee for high-calorific waste at the level of competing disposal alternatives limited the distortion of competition on the market for this waste. It must be noted that no company in the Netherlands had an obligation to supply RDF waste or high-calorific hazardous waste to AVR Nuts or AVR IW. In contrast, the concession agreement obliged AVR Nuts to accept any C2 and RDF waste offered to it, whether or not supplied together with high-calorific hazardous waste. In this respect, the Commission finds insufficient evidence that there was *prima facie*

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abuse of a dominant position by AVR Nuts and that the concession agreement certainly does not provide a basis for such abuse.

- (100) Compensation in the event of closure: The provisions in the concession agreement that concern – in the event of the agreement not being extended - the compensation for the remaining book value of the as yet undepreciated investments that AVR had made during the period covered by this agreement with the consent of the State must similarly be considered to be proportionate. Without such a guarantee, AVR's agreement could not reasonably be expected. The same applies to the guarantee by the State to cover a maximum of 30 % of the costs of removal and decontamination in the event of the installations being liquidated. Appropriate removal and decontamination are obviously in the public interest. Given its 30 % share in AVR Chemie, it is acceptable that the State should assume responsibility for its part, leaving the remainder for the other shareholder, AVR Holding.
- (101) Maintaining two RDFs at the outset: The Commission examined whether the Netherlands should have granted aid for maintaining only one RDF. The question is whether the contribution to the realisation of the objectives pursued by the Netherlands by maintaining the second RDF offsets the aid required and the unfavourable effects on competition resulting from this.
- (102) The Commission here acknowledges that the Netherlands could legitimately aim to have sufficient domestic capacity for the treatment of RDF waste in order to avoid a capacity shortfall which would oblige the State to allow the exportation of such waste. Some flexibility in the assessment is unavoidable as the flows of C2 and RDF waste that would result could not be predicted with certainty and because of the risks attaching to the availability of the installations. Such risks indeed materialised when, following a number of incidents, one of the RDFs was closed for some time in 2002. The available capacity in 2002 and 2003 was only 73 % and 75 % respectively of the permitted capacity of 100 000 tonnes and, for this reason, the Dutch authorities had to allow RDF waste to be exported, contrary to their policy aim.
- (103) When comparing expected quantities of RDF waste and the capacity of the two RDFs, the following must be noted. When the concession agreement was prepared in the period from end-2001 to mid-2002, the expected supply of RDF waste was put at around 38 500 tonnes per year. This estimate was based on past experience. Treatment requires at least the same volume of high-calorific waste. One RDF would clearly not have been sufficient for the proper treatment of this volume of waste. This figure is, however, open to criticism in three respects. First, part of the expected supply of RDF waste to AVR Nuts may have been the consequence of the restrictive application of the definition of 'waste for recovery' by the Netherlands up to the beginning of 2003. Second, interested parties have pointed to alternative domestic capacity for dealing with RDF waste. Third, the estimate would not take into account the possibility for AVR to treat part of the waste in

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its grate incinerators for municipal waste⁽²¹⁾. On the other hand, the estimate explicitly took account of ongoing developments at the time. In addition, the supply of RDF waste for export varies from year to year and depends on the situation on the international market. The situation varies as well for different categories of waste. Moreover, in early 2002 there was still a substantial stock of RDF waste, with the result that supply at the beginning of the period was guaranteed. Furthermore, had the Dutch authorities in 2002 based the estimated flow of RDF waste on the assumption that the definition of ‘waste for recovery’ would have been correctly applied, the estimate might have been lower, but it seems unlikely that, on the basis of the information available at the time, such an estimate would have been so low that they could have confidently decided that only one RDF would suffice. This is confirmed by the fact that in 2003, when the Court already had clarified the proper definition of ‘waste for recovery’, AVR's capacity problems still forced the Netherlands to allow actual exports of RDF waste. The actual decline in the flow of RDF waste to AVR is explained to a significant extent by factors other than the increase in exports. With respect to other capacity in the Netherlands, the Commission notes that a significant part of that capacity became available only in late 2003, after the required permits had been issued to the main competing pyrolysis installation. The interested parties have failed to demonstrate that the Dutch authorities should have taken into account back in 2002 sufficient alternative domestic capacity for treating all types of RDF waste produced in the Netherlands and delivered for disposal.

- (104) The decision to keep in operation two RDFs instead of one increased the level of aid, in particular because of the investments which appeared to be necessary and in respect of which compensation had subsequently to be paid because of the closure. Some of these investments had not, however, been foreseen at the time the concession agreement was signed. The effects on the predetermined operating deficits were relatively limited because of the relatively high proportion of fixed costs. The Commission expects the effects on competitors to remain relatively limited as well: there is no indication that keeping two RDFs in operation has resulted in larger quantities of RDF and other hazardous waste being incinerated. Using RDF capacity for other types of waste, for which no evidence has been provided, is relatively inefficient and cannot be reckoned to have had a strong negative effect on competitors.
- (105) Accordingly, it appears to the Commission that the original decision to keep two RDFs in operation can be considered to be proportionate and that the decisions to close the RDFs were not unreasonably overdue.
- (106) Involvement of AVR IW: AVR IW was responsible for much of AVR Nuts' administration and, at the same time, was a competitor for other suppliers of hazardous waste. In this way, it obtained information on intended and actual supplies of waste. As no single supplier was under an obligation to supply to AVR Nuts the quantities originally indicated and as the actual fees and

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discounts were ultimately based solely on actual volumes of waste supplied, it is difficult to see how AVR IW could have obtained a financial or strategic advantage by virtue of its central position. The Netherlands explained that AVR IW was unable to abuse this position and the Commission, on the basis of the comments from interested parties among other things, cannot come to this conclusion either. It may be true that AVR IW, on its own behalf, offered to treat waste at fees below those charged by AVR Nuts, but this cannot be attributed to the aid measures and could fall within the realm of competitive behaviour; any competitor was free to act in a similar manner. Similarly, even if AVR IW rerouted part of the RDF waste to its municipal waste incinerators, which has not been proved, this does not seem to have resulted in a disproportionate distortion since any supplier with knowledge of the waste could have earned similar margins by simply supplying such waste directly to other municipal waste incinerators operated by AVR or others. Moreover, as the aid was determined on the basis of a predetermined budget, the Commission expects AVR to have opted for efficient solutions, and not to have rerouted waste if this would have led to underutilisation of the installations and hence higher actual losses. In fact, such rerouting may well be regarded as efficient waste management in line with the Community principles.

- (107) Technological development: The Commission does not expect the measures to have a pronounced adverse effect on the development of alternative disposal and recovery technologies. As explained by the Netherlands, other instruments exist for encouraging such developments. In 2003, for example, a permit was granted for an innovative pyrolysis installation. The fees charged by AVR were significantly higher than the fees charged by the operator of that installation and so the distortive effect of the aid must be considered to be limited in this respect.
- (108) Aid for the acquisition of waste: In contrast to the above aspects, the measures cannot be regarded as proportionate as regards the acquisition of waste as carried out by AVR IW and for which AVR Nuts pays compensation out of the aid it receives from the State. The Commission accepts that minimising the costs of the system requires maximising the volume of waste to be treated, especially the volume of RDF waste, for which the gate fees are highest. As indicated in point 99, the system of non-discriminatory staggered rebates can be accepted for this reason. In contrast, the compensation granted to AVR IW in respect of the acquisition of waste distorts competition in a disproportionate way as AVR IW is the sole recipient. Its competitors do not receive similar compensation for acquisition costs incurred by them. As regards high-calorific hazardous waste, had there been persistent shortages, the solution could have consisted in lowering the gate fees in a non-discriminatory fashion. As regards RDF waste, the compensation for acquisition costs must be considered as disproportionate too. It confers on AVR IW a discriminatory advantage for a specific activity that is in direct competition with other waste management

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companies. Such acquisition is not directly in the public interest that justifies the aid, and this is certainly the case with RDF waste acquired abroad. But, even in the case of RDF waste from Dutch sources, acquisition may encourage disposal in the Netherlands at the expense of recovery in the Netherlands or elsewhere. Under specific circumstances, this may be contrary to the principle of treatment near the source. Consequently, the amount of €2,4 million intended for acquisition, included in the aid to AVR Nuts, which was based on the predetermined budget, and transferred to AVR IW cannot be justified on the basis of Article 86(2) of the Treaty. The compatibility of this part of the measure with Article 87(2) and (3) is assessed in Section 6.3 below.

- 6.3 Assessment on the basis of Article 87 of the compensation for acquisition costs
- (109) The Commission has examined whether the exemptions in Article 87(2) and (3) of the Treaty apply to the compensation for acquisition costs granted to AVR IW. The exemptions in Article 87(2) could serve as a basis for considering aid to be compatible with the common market. However, the aid (a) does not have a social character and is not granted to individual consumers, (b) does not make good the damage caused by natural disasters or exceptional occurrences and (c) is not required in order to compensate for the economic disadvantages caused by the division of Germany.
- (110) Similarly, the exemptions in Article 87(3)(a), (b) and (d), which refer to aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, aid to promote projects of common European interest or to remedy a serious disturbance of the economy of a Member State, and aid to promote culture and heritage conservation, do not apply in the present case. The Netherlands has not attempted to justify the aid on any of these grounds.
- (111) As regards the first part of the exemption in Article 87(3)(c), namely aid to facilitate the development of certain economic activities, the Commission notes that the aid does not involve research and development, investment by small and medium-sized enterprises or the rescue or restructuring of AVR IW. Nor does the aid serve regional development purposes, and AVR IW is not located in an area where start-up investments are eligible for regional aid. Therefore, the aid cannot be declared compatible with the common market on the ground that it would facilitate the development of certain regions.
- (112) The Commission has examined whether the aid measure qualifies for exemption under Article 87(3)(c) on any other grounds and, in particular, whether the environmental aid guidelines apply to this case. Since the aid constitutes operating aid, the Commission has assessed it in the light of Section E.3.1 of those guidelines. The aid is, however, not shown to be absolutely necessary, nor is it strictly limited to compensating for extra

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production costs by comparison with market prices of the relevant products or services.

- (113) As none of the exemptions is applicable, the Commission concludes that this aid is incompatible with the common market and, in accordance with Article 14 of Regulation (EC) No 659/1999, should be recovered from the recipient, AVR IW, in conformity with the provisions set out in Chapter V of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty⁽²²⁾.

7. CONCLUSION

- (114) In conclusion, the Commission finds that the following measures constitute state aid for AVR Nuts: 1. the compensation for the budget deficits in 2002 and 2003; 2. the compensation for the budget deficits in 2004 and in the remaining period 2005-06; 3. the compensation for closure costs, which consists in (a) compensation for closure costs related to the agreed investments to the extent they have not yet been written off and (b) compensation for closure costs due to the early termination of the treatment of RDF waste; and 4. the aid contained in the guarantee. The aid, except for the part of it designed to compensate for the costs of acquiring waste, can be found compatible with the common market as it constitutes compensation for the costs of an SGEI within the meaning of Article 86(2) of the Treaty, on condition that the aid does not exceed the actual losses incurred during that period and that allowance is made for no more than a reasonable profit margin. To this end, the Commission requests the Netherlands to submit annual reports on the actual use of the aid and the profitability of the activities during the year concerned. The Netherlands should also verify the compensation for closure costs and, in so doing, address the issues enumerated in Annex II. An interim report on this verification must be submitted to the Commission by the spring of 2006 and the final report by the spring of 2007. The Netherlands should notify any aid granted to AVR Nuts that would allow the company to attain a profitability level higher than the rate of return on Dutch government bonds plus 2 percentage points. This aid may not be paid out before the Commission has approved it pursuant to Article 4 or 7 of Council Regulation (EC) No 659/1999.
- (115) However, the compensation of €2 396 000 granted to AVR IW for the costs of acquiring waste cannot be found compatible since it cannot be regarded as proportionate compensation for the SGEI. Instead, it compensates AVR IW for costs that should normally be included in the budget of a waste treatment company. None of the exemptions from the prohibition on state aid in Article 87(1) of the Treaty is applicable. Consequently, this part of the aid must be recovered directly from AVR IW. To this end, the Commission requests the Netherlands to enjoin AVR IW to repay the aid with interest in line with the conditions laid down in this decision.

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- (116) The Commission asks the Netherlands to provide the information requested using the questionnaire attached in Annex III to this decision, indicating clearly the measures planned and already taken to obtain immediate and effective recovery of the aid. It calls on the Netherlands to submit within two months of the notification of the decision all documents showing that recovery proceedings have been initiated against AVR IW (such as recovery orders),

HAS ADOPTED THIS DECISION:

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- (1) [OJ C 196, 20.8.2003, p. 5](#), and [OJ C 250, 9.10.2004, p. 6](#).
- (2) See footnote 1.
- (3) [OJ L 83, 27.3.1999, p. 1](#).
- (4) See footnote 1.
- (5) [OJ L 195, 25.7.1975, p. 39](#); as subsequently amended by Regulation (EC) No 1882/2003 of the European Parliament and the Council ([OJ L 284, 31.10.2003, p. 1](#)).
- (6) The concession agreement defines RDF waste as follows: that part of the waste streams the incineration of which is regarded as disposal, i.e. hazardous waste with a calorific value of less than 11,5 MJ/kg (≤ 1 % chlorine) or 15 MJ/kg (> 1 % chlorine), packaged hazardous waste, specific hospital waste and waste containing PCBs.
- (7) [OJ L 30, 6.2.1993, p. 1](#); as subsequently amended by Commission Regulation (EC) No 2557/2001 ([OJ L 349, 31.12.2001, p. 1](#)).
- (8) See, in particular, Case C-203/96 *Chemische Afvalstoffen Dusseldorp B.V. and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [1998] ECR I-4075.
- (9) See, in particular, Case C-288/00 *Commission v Germany* [2003] ECR I-1439.
- (10) Source: *Toekomst verbranden specifiek gevaarlijk afval*, AOO-2004-12, prepared by the Afval Overleg Orgaan, July 2004, www.aoo.nl.
- (11) [OJ L 195, 29.7.1980, p. 35](#), as last amended by Directive 2000/52/EC ([OJ L 193, 29.7.2000, p. 75](#)).
- (12) The aid is, however, reduced by €75 000 for each month that the Province of South Holland allows ‘peakshaving of CO emissions’. When the operating deficit was established, this was not yet known. The amount represents the expected monthly cost saving where peakshaving is allowed.
- (13) For high-calorific hazardous waste, there were initially a few exceptions due to ongoing contracts.
- (14) [OJ C 37, 3.2.2001, p. 3](#).
- (15) Case C-280/00 *Altmark Trans GmbH, Regierungspraesidium Magdeburg/Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747.
- (16) Article 5.3 of the Concession Agreement and Article 5.2 of the Service Agreement for AVR companies (Annex 7.2.A to the Concession Agreement).
- (17) Communication from the Commission on services of general interest in Europe ([OJ C 17, 19.1.2001, p. 4, point 22](#)).
- (18) Green Paper on services of general interest (COM(2003) 270 final, 21.5.2003) and White Paper on services of general interest (COM(2004) 374 final, 12.5.2004).
- (19) Case C 209/98 *Entreprenørforeningens Affalds/Miljøsektion (FFAD) v Københavns Kommune* (‘Sydhavnens Sten&Co’) [2000] ECR 3743, paragraph 75. An example where the Commission considered the management of a particular waste to be an SGEI can be found in the state aid field with regard to the collection of halons and CFCs (state aid No N 638/2002, [OJ C 82, 5.4.2003, p. 18](#)). See also in this connection Case C 240/83 *Procureur de la République v Association de défense des brûleurs d'huiles usagées* [1985] ECR 531.
- (20) In addition, the concession agreement contains a provision for interim upward adjustment in the event of changed public policy measures or calamities beyond the influence of AVR. A similar provision allows downward adjustment of the aid in the event of a significantly smaller loss than that determined in advance.
- (21) The three joint competitors pointed out in particular that Figure 3.2 on theoretical and actual availability and the supply of hazardous waste in the study ‘Toekomst verbranden specifiek gevaarlijk afval’ (annexed to their comments and also to the letter from the Netherlands) suggests an unduly high estimate for the supply of RDF waste because it would not take into account the possibility for AVR to treat part of the waste in its grate incinerators for municipal waste. AVR’s practice is, however, explicitly described in paragraph 3.1.2 of that study.
- (22) [OJ L 140, 30.4.2004, p. 1](#).

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